UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 6

UTILITY WORKERS UNITED ASSOCIATION, LOCAL 537,

and **Case 06-CB-235968**

PENNSYLVANIA AMERICAN WATER COMPANY

MEMORANDUM OF LAW OF UTILITY WORKERS UNITEDASSOCIATION,LOCAL 537 IN SUPPORT OF RESPONSE TO RULE TO SHOW CAUSE WHY THE CHARGING PARTY'S MOTION FOR PARTIAL SUMMARY JUDGMENT SHOULD NOT BE GRANTED

INTRODUCTION AND FACTUAL BACKGROUND

Utility Workers Union of America, System Local 537 (hereinafter "System Local 537"), affiliated with the Utility Workers Union of America, AFL-CIO (hereinafter "the National Union") was, for many years prior to March 19, 2018, the certified collective bargaining representative for various employees of the Pennsylvania American Water Company (hereinafter "the Employer"), including those production, maintenance and clerical employees employed in the greater Pittsburgh, Pennsylvania area (the "Pittsburgh District employees") and in the counties in Western Pennsylvania surrounding Pittsburgh (the "Outside Districts employees"). On March 19, 2018, a collective bargaining agreement was in effect between the Employer and System Local 537 for the Pittsburgh district, which was due to expire on May 17, 2019. On March 19, 2018, the last contract for the Outside Districts had expired on November 17, 2017, but System Local 537 and the Employer had engaged in contract renewal negotiations which

resulted in a vote by the Outside Districts employees on March 17, 2018, to ratify the terms of a renewal offer that was presented to those members on March 17, 2018.

By January of 2018, the members of the Executive Board of System Local 537 had received numerous complaints by the members of System Local 537 about System Local 537's continued affiliation with the National Union and as a result, they determined to hold a secret ballot vote among the members of System Local 537 to see if those members desired to disaffiliate from System Local 537.[1] To accomplish the disaffiliation, if the members of System Local 537 desired to do that, the Charged Party was formed in early February of 2018 as a labor organization. The organizers of the Charged Party were the officers of System Local 537, they adopted System Local 537's bylaws and dues structure without alteration (except for name change and deletion of reference to affiliation with the National Union), and they received the approval of the Internal Revenue Service for the Charged Party to be recognized as a non-profit labor organization by the Internal Revenue Service. In accordance with the bylaws of System Local 537, notice of a union-wide secret ballot meeting to vote upon the question of disaffiliation among the members of System Local 537 was given, such a meeting was held on March 19, 2018, and the members of System Local 537 voted via secret ballot to disaffiliate from System Local 537 and to affiliate with the Charged Party. On that same day, the Charged Party notified the Employer of the affiliation and advised the Employer that the same officers and grievance representatives that were with System Local 537 would remain in place, and that all contracts, procedures, union dues and the like would remain in place, unchanged.

On the same day, March 19, 2018, the National Union placed System Local 537 in trusteeship, removed all of its officers from their officer positions and confiscated all of the

[1] The statements contained in this Memorandum of Law are factual allegations that the Charged Party is prepared to establish at trial in this matter. In light of Rule 102.24 of the National Labor Relations Board that does not require affidavits or documentary evidence to support the position of the Charged Party, these factual allegations are

assets of System Local 537. Eight days later, the National Union filed a lawsuit in the United States District Court for the Western District of Pennsylvania to enforce the trusteeship ("the trusteeship case"). It then sought a preliminary injunction to prevent the officers of System Local 537 from ". . . representing themselves as the authorized officers or representatives of [System Local 537] or as the officers of [the Charged Party]. . . ." and requiring them to "[c]ease and desist from interfering in any manner with the conduct of the trusteeship. . . .". See Ex. 5 attached to the Employer's Motion for Partial Summary Judgment. Because the officers of System Local 537 and the Charged Party concluded that the District Court would, out of an abundance of caution, grant the preliminary injunction to preserve the status quo pending trial and because the defendants in the lawsuit had no funds with which to advance the litigation at that point, they consented to the preliminary injunction. Ultimately, the National Union voluntarily dismissed the trusteeship case-this occurred on March 6, 2019, almost a year after the trusteeship case was filed.

In the meantime, the members of the Charged Party wished to be rid of System Local 537 and the National Union. As a result, a member of the Charged Party employed in the Pittsburgh District filed a Petition for Decertification on April 17, 2018, and a member of the Charged Party employed in the Outside Districts filed a Petition for Decertification on April 10, 2018. Both petitions, which were filed in Region 6, sought to replace System Local 537 with the Charged Party as the collective bargaining representative for those units. See Exhibits 1 and 2 attached to the Employer's Motion for Partial Summary Judgment. The Region suspended any action on the petitions until it could determine what impact, if any, the trusteeship case had on the decertification petitions. After a hearing held in October of 2018, the Region decided to proceed with the decertification petitions and following elections held in December of 2018, the Charged

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referred to in support of the Charged Party's position that there are genuine issues of material fact sufficient to

Party was certified as the collective bargaining agent for the Pittsburgh District and the Outside Districts.

Following those certifications, in late December of 2018 and in early January of 2019, the Charged Party advised the Employer that the Charged Party desired to accept and be bound by the Pittsburgh collective bargaining agreement, which was due to expire in May of 2019 and the newly ratified Outside Districts agreement which was due to expire in November of 2023. The Employer refused to honor those agreements and instead asserted that it would honor the "status quo" which it defined as the terms and conditions of employment in place when Region Six certified the Charged Party as the collective bargaining representative. Those conditions, according to the Employer, were the terms and conditions embodied in the Pittsburgh and Outside Districts agreements, except for the obligation to arbitrate grievances and except for the obligation to honor union dues deductions.

The Employer then requested the Charged Party to commence negotiations for a "first contract" in both locations. The Charged Party stated with regard to each situation that contracts were already in place and that the Charged Party as the successor to System Local 537, was the System Local 537 replacement in each case. As for the Pittsburgh contract, since it was due to expire in May of 2019, the Charged Party stated that it was willing to meet to negotiate a replacement agreement for the one about to expire, and those negotiations have been scheduled. As for the Outside Districts agreement, the Charged Party stated that the agreement, which it desired to honor and to continue in force, had over four years to run, so there was no need to commence negotiations on that agreement.

The Employer filed the instant unfair labor practice charge and a complaint was issued. The Charged Party filed its answer to the complaint, and insofar as the Employer's Motion for

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warrant denial of the Employer's Motion for Partial Summary Judgment.

Partial Summary Judgment is concerned, the Charged Party contends that it is the lawful successor to System Local 537, that as far as the Pittsburgh District is concerned, that contract has expired and the parties are in the process of negotiating a renewal so nothing more needs done, and insofar as the Outside Districts are concerned, that contract is still in force and must be honored by the Employer.

DISCUSSION

A. Applicable Legal Standard

Summary judgment should only be entered if there is no genuine issue of material fact that would justify entering judgment for the moving party as a matter of law. Security Walls, LLC, 361 NLRB 348 (2014). All doubts as to the existence of genuine issues of material fact are to be resolved against the party seeking summary judgment. While it is generally true that summary judgment can be granted when issues are raised in a particular case that could have been raised in a prior representation proceeding, E. W. Howell Co., LLC, 367 NLRB, No. 69, at*2 (2019), the present case is not of that nature. In the present case, the representation petitions were filed at a point in time when a court order was in place in the trusteeship case which forbade the Charged Party and any of its officers from taking any action that would have interfered with the conduct of the trusteeship. Urging a disaffiliation as the reason to circumvent a trusteeship is a clear violation of that court order and the instant case presents a unique situation where an outside force, namely a preliminary injunction, prohibited anyone from raising the disaffiliation issue in the representation proceedings. Region Six evidently subscribed to that position since it held the representation petitions in abeyance for many months to determine whether the trusteeship case prohibited the Region from proceeding with the representation proceedings. Even though the Region ultimately proceeded with the representation proceedings, that did not allow the Charged Party and its officers to ignore the terms of the injunction.

B. Impact of the Representation Proceedings on the Contracts Negotiated By System Local 537

The General Counsel and the Employer take the position that in any case where an incumbent union is replaced by another union as a result of decertification proceedings, the contract negotiated by the incumbent is ipso facto rendered "void". However, every case cited by the Employer where that has occurred and every case uncovered by the Charged Party where that has occurred as been a case where a "new" union which was not merely a reincarnation of the "former" union unseated an incumbent union, and the employer was the entity seeking to continue the incumbent's contract in force. It is submitted that there are no cases decided by the National Labor Relations Board or the courts where, in a decertification case where the "new" union wanted to continue the former union's contract, it was prevented from doing so.

In Mulvaney Mechanical, Inc. v. Sheet Metal Workers Union, 288 F.3d 491 (2nd Cir. 2002), the issue before the Court was similar to the decertification argument made here. In Mulvaney, supra, the employer argued that a strike conducted by a union which was the representative of its employees worked a dissolution of the contract and the bargaining relationship between the employer and that union. The Court of Appeals, relying on Abrams v. Carrier Corp., supra, held as follows:

> "Finally, even if the strike had dissolved the bargaining relationship between Mulvaney and Local 38, we are not persuaded that the collective bargaining agreement was terminated automatically. It is settled that when a union which is a party to an existing collective bargaining agreement is decertified, the successor union is not necessarily bound by the terms of the unexpired labor contract. *See NLRB v. Burns Int'l. Sec. Servs.,Inc. 406 U. S. 272, 284 n. 8, 92 S. Ct.1571, 32 L. Ed. 2d 61 (1972); see also Am. Seating Co.,* 106 N.L.R.B 250, 255, 1953 WL 10942 (1953) (establishing this rule). Yet, Mulvaney fails to direct us to any authority holding that such termination of the agreement is automatic, rather than at the prerogative of the incoming union. Our precedents indicate it is not automatic. *See Abrams v. Carrier Corp., 434 F.2d 1234, 1244 (2d Cir. 1970).* In *Abrams,* we expressed disapproval of the lower court's reliance on the NLRB's decision in *American Seating* for the proposition that the certification of a successor union automatically terminated a pre-existing

collective bargaining agreement. As we held in *Abrams*

> *American Seating* simply held that it was an unfair labor practice for an employer to refuse to bargain with a newly certified union upon the ground that it was bound by a prior contract with a former bargaining representative. It does not follow from this reasoning that until a new agreement is reached with a new bargaining representative, the old agreement, or at least those portions thereof necessary for the continuation of the employer-employee relationship, automatically ceased to exist....

Id. Because we are not convinced that the alleged cessation of the bargaining relationship between Mulvaney and Local 38 would have automatically terminated the agreement—rather than simply render the contract voidable—we reject the employer's argument in support of *ipso facto* termination. p. 500 of 288 F.3d, emphasis added.

The National Labor Relations Board held in American Seating, supra,

> "Neither the Board nor the courts have decided, however, the effect a new certification has upon an existing, collective-bargaining contract which has been held not a bar to a new determination of representatives because it is of unreasonable duration." 106 NLRB, at p. 254.

The very cases cited by the Employer do not present a ringing endorsement of the proposition that the Employer is advancing. The Employer cites RCA Del Caribe, Inc., 262 N. L. R. B. 963 (1982) and More Truck Lines, 336 N. L. R. B. 772 (2001) for the proposition that when a collective bargaining agent is dispossessed by virtue of a decertification proceeding, any existing labor contract is "void". However, those cases and the other Board cases like them were all situations where the new collective bargaining agent wanted to negotiate a new agreement and the employer was insisting that since the dispossessed collective bargaining agent had previously negotiated a labor agreement, the new representative was bound by that prior agreement. In More Truck Lines, 336 N. L. R. B. 772 (2001) the Board backed away from the strict interpretation of the concept of a "void" contract that was set forth in RCA Del Caribe, Inc, supra. The Board in RCA Del Caribe, Inc., supra, held that

> "If the incumbent prevails in the election held, any contract executed with

> the incumbent will be valid and binding. If the challenging union prevails, however, any contract executed with the incumbent will be null and void." 262 N. L. R. B., at p. 966.

However, in More Truck Lines, supra, it was held that:

> "Applying these principles to the instant case, we find that the Respondent's reading of *RCA Del Caribe* goes too far. Thus, contrary to the Respondent's contention, the phrase "null and void" in *RCA Del Caribe* cannot be read literally to mean that an employer may treat the terms and conditions of employment established under an agreement with a defeated incumbent union as if they never existed. To do so would allow, or arguably compel, an employer to reset employees' then existing conditions of employment to those that were in effect prior to the final employer-incumbent agreement. In agreement with the judge, we are convinced that the Board in *RCA Del Caribe* only intended the phrase "null and void" to mean that a successful intervening union must be afforded an opportunity to negotiate a new contract, rather than be saddled with the one entered into by the defeated incumbent. . . . See *NLRB v. Katz,* supra; R.E.C. Corp., 296 NLRB 1293 (1989)." 336 N.L.R.B., at pp. 772-773, emphasis added.

Stating that ". . . a successful intervening union must be afforded an opportunity to negotiate a new contract . . . ." can only realistically mean that the "new" union has the option to decide if it wants to keep the entire "old" agreement in force or if it wants to consider it void. This inference clearly flows from the fact that the "new" union is to be "afforded an opportunity to negotiate a new contract". "Affording an opportunity" can only mean providing an option to do one of two things, namely accepting or rejecting the predecessor's contract. In the instant case, the Plaintiff exercised the option to continue to be bound by the contracts attached to the Amended Complaint. See also Boston Machine Works, 89 NLRB 59 (1950), where it was said that-

> "With regard to the duty of the Employer and the representative of its employees to bargain now or in the future upon the basis of the current contract or for a new contract, we do not believe it to be this Board's function, in a representation proceeding, to pass upon this issue." 89 NLRB, at p. 61.

C. The Impact of Disaffiliation

In the instant case, the Charged Party is prepared to present evidence that the disaffiliation that occurred was a situation where the exact same individuals who were members of System

Local 537 transferred their affiliation to a newly created entity (the Charged Party), the officers and agents of System Local 537 and the officers of the Charged Party were identical, the bylaws were unchanged, the dues were unchanged and the Charged Party stated that it was willing to administer all contracts according to their terms. This is a situation identical to American Etc. Inc. d/b/a/Royal Laundry, 20-RM-2868, unreported (NLRB Region 20, 2009). See also Tile, Marble, Terrazzo, Finishers, Etc., Local 32, et al v. Tile, Marble, Terrazzo, Helpers, Etc., Local 32, et al, 896 F.2d 1404 (3rd Cir. 1990), holding that a disaffiliation—

> ". . . may be accomplished in any manner sufficient to show a voluntary decision to part with union membership. International Bhd. of Boilermakers v. Local Lodge 714, 696 F. Supp. 391, 392 (N. D. Ill.). In Lodge 714, the district court found that it was sufficient to show voluntary resignation when the membership undertook actions that were quite similar to the ones taken by the membership of TMT Local 32, i.e., signatures on a petition explicitly providing that the member was disaffiliating from the international union, revocation of checkoff authorization for payment of membership dues to the international union and a declaration of a new union as bargaining representative. Id. at 393 (the court also noted that "case law recognizes that voting to disaffiliate at a union meeting constitutes voluntary resignation"). See also Bradley v. Local 119, Int'l Union of Elec., Radio and Mach. Workers, 236 F. Supp. 724, 729 (E. D. Pa. 1964) (combining revocation of dues authorization with submission of a signed writing communicating decision to part with union was sufficient)." 896 F.2d, at p. 1413.

In the case of N. L. R. B. v. Hershey Chocolate Corp., 297 F.2d 286 (3rd Cir. 1961), the Court found that the disaffiliation of a local union from one international organization to another international organization did not amount to the entry of a "new" union into the bargaining relationship. The Court noted that all officers, all executive board members and all shop stewards remained the same. It also noted that nothing else had changed other than the association with a different international union and a minor change in the name of the union. The Court specifically stated that—

> "The change in name is urged as an element of the local's newness. That sort of surface dissimilarity points up the need of facing the facts instead of attempting to apply a rigid over-all pattern which may have fitted in

> some instances but offers no fair solution to the Hershey situation. From all the evidence it must be concluded that the choosing of a new international and indicating that relationship in its name was not a secession movement from the old local. It was merely the local's members acceptance of the bitter truth that . . . there was no viable future for them with the BCW International. So, dropping the connection they discarded the soiled name. Joining the ABC International, they included that name in their local masthead and in keeping with their own decency. The old union has not disappeared." 297 F.2d, at p. 291.

Additionally, the case of Baldor Electric Company, 258 NLRB 1325 (1981) clearly sets forth the standards to be applied in the case where, outside of decertification proceedings, employees voted to disaffiliate from one union and affiliate with another union.

> "There are circumstances, of course, under which the Board has found that the principles of free employee choice and stability of bargaining relations are upheld by requiring an employer to bargain with a successor union as a result of affiliation, disaffiliation, merger, etc. For example, in *Quemetco, supra*, relied on by the Administrative Law Judge herein, the Board required the respondent employer to bargain with a successor union after the employees had voted unanimously in favor of affiliation with that union. . . . there was no competing group of employees demanding that the employer bargain with the predecessor union or a remnant of that union. . . . In *Quemetco, supra*, the Board faulted the respondent for ignoring the clear and unanimous choice of the employees and taking it upon itself to choose the employees' collective-bargaining representative." 258 NLRB, at p. 1326.

See also Newspapers, Inc., 210 NLRB 8 (1974) and Lord Jim's, 259 NLRB 1162 (1982) to the effect that a properly posted secret ballot election is all that is needed to effectuate a disaffiliation. In Chesapeake & Potomac Telephone Company, 89 NLRB 231 (1950), the Board clearly held that

> "We find no merit in the Petitioner's contention that since the predecessor local union was liquidated, the contract of 1948 became ineffective. We are of the opinion that the facts here are analogous to those in the *Michigan Bell Telephone* case. The record here is devoid of evidence that the affiliation with the CWA (CIO) has had any effect upon the structure, functions, or membership of the local union. The only change which we note in the character and status of the local union is one of designation and affiliation. There is no question of its continuing and current representative position. Under these circumstances we are of the opinion that the contract of 1948 is a valid and subsisting agreement between Division

34, CWA (CIO) and the Employer." 89 NLRB, at p. 232.

To the same effect is Louisville Railway Company, 90 NLRB 678 (1950), citing Chesapeake & Potomac Telephone Company, supra, as the authority for its holding. See also Prudential Insurance Company of America, 106 NLRB 237 (1953), where it was held that-

> "In The Louisville Railway Company case, under circumstances closely paralleling those herein, the Board held that the assignment of a contract by a local, to which its international was not a signatory, to a newly formed successor labor organization, did not destroy the continuing identity of the contractual bargaining representative, and that the assigned contract between the successor and the employer constituted a bar. Finding that no schism had occurred under those circumstances, the Board stated that that case was analogous to decisions in which it held that a mere change of affiliation of the contracting union did not disturb the continuing identity of the contractual bargaining agent, ...
>
> We believe that our decision in the Louisville case, and related decisions, is controlling here. In the instant case, Local 10 alone had been certified as the exclusive bargaining representative of the Employer's Maryland agents, and had separately bargained for and executed the contract here involved. After the membership of Local 10 voted to disaffiliate from the IAIU, dissolve Local 10, and assign its contract to the newly formed Associated, the Associated succeeded to the contract with the Employer." 106 NLRB, at pp. 240-241.

The Outside Districts contract and the Pittsburgh District contract both provide that they will be binding on the parties ". . . and their successors and assigns. . . ." The Charged Party is clearly the successor to System Local 537.

D. Waiver

The Charged Party will also produce evidence that the Employer has waived its position that the Outside Districts contract is not in effect. While the Employer has taken the consistent position that all that it was required to do upon certification of the Charged Party in January of 2019 was to maintain what it called the "status quo", which it defined as the set of working conditions that were in effect on that day, it has actually honored various provisions of the labor contract asserted by the Charged Party that did not require adherence until many months

thereafter. If the Employer contends that the contract was "void", abiding by those of its provisions that did not become operative until many months after the decertification proceedings is a clear waiver of its position, and that waiver position arises from the very language of the contract at issue. It is impossible to understand how the Employer can argue on the one hand that the Outside Districts contract became void in late 2018 or early 2019 and then it honored those of its provisions that only came into being in late 2019 if the contract was in effect.

E. Conclusion

This case presents a unique situation from a number of perspectives. This appears to be the only case other than Mulvaney, supra, where a newly certified labor organization desires to retain the labor agreements negotiated by its predecessor. Since representational issues are all about employee choice and not employer choice, it is respectfully submitted that since the Employer was content to agree to the Pittsburgh and Outside Districts labor contracts when they were negotiated by System Local 537 (in one case a day before the disaffiliation), there can be no logical reason to allow the Employer to choose not to be bound by the contracts when the employees and their representative are willing to be so bound.

This case also presents the unique situation where a disaffiliation occurred the day before System Local 537 was placed in trusteeship, followed by a court order that prevented the advancement of the disaffiliation. The Employer and the General Counsel simply want to ignore the fact that a disaffiliation occurred and in so doing, they are ignoring well-established Board law that militates in favor of the Charged Party's position that the decertification proceedings should be ignored. Added to this scenario is the fact that when the National Union voluntarily withdrew the trusteeship case, the situation at hand reverted to the state of affairs that existed before any decertification petitions were filed See Long v. Board of Pardons and Paroles of Texas, 725 F.2d 306 (5th Cir. 1984)-"A voluntary dismissal without prejudice leaves the situation

as if the action had never been filed. After a dismissal the action is no longer pending in the court and no further proceedings in the action are proper. 9 Wright & Miller, Federal Practice and Procedure, §2367 at p. 186 (1971)." P. 307 of 725 F.2d. Thus, by the withdrawal of the trusteeship litigation, the Plaintiff and the Defendant here were left in a situation where, as of March 19, 2018, the members of the Predecessor Union had validly disaffiliated from the Predecessor Union and the Plaintiff became the successor to the Predecessor Union, with the right to assume the contracts involved. See also Raymond F. Kravis Center For The Performing Arts, 351 NLRB 143 (2007)-

> ". . . an employer is not relieved of its bargaining obligation merely because the merger or affiliation is accomplished. . . ." P. 143 of 351 NLRB.
>
> "The Union argues that . . . the merger raised no question concerning representation that would require [the newly formed union] to seek an election before it could represent the Respondent's employees. . . . we find merit in the Union's argument. . . ." P. 145 of 351 NLRB. Emphasis added.
>
> ". . . the Board [is authorized] to conduct a representation election only where affiliation raises a question of representation. Conversely, where affiliation does not raise a question of representation, the statute gives the Board no authority to act. . . .[T]he Act establishes a specific election procedure to decide whether the employees desire a change in a certified union's representative status. . . .the Act gives the Board no authority to require unions to follow other procedures in adopting organizational changes." P. 145-146 of 351 NLRB, quoting from NLRB v. Financial Institution Employees of America Local 1182 (Seattle-First), 475 U. S. 192 (1986), emphasis in original.
>
> "affiliation does not directly involve the employment relation." P. 146 of 351 NLRB.
>
> ". . . a question concerning representation in relation to an incumbent union is presented when the employer has a good-faith reasonable uncertainty whether a majority of unit employees continues to support the union. . . . P. 146 of 351 NLRB, emphasis added.
>
> "We therefore overrule our prior law and hold that, when there is a union merger or affiliation, an employer's obligation to recognize and bargain with an incumbent union continues unless the changes resulting from the

merger or affiliation are so significant as to alter the identity of the bargaining representative." P. 147 of 351 NLRB, emphasis added.

The issues in this case require factual development before they can be resolved. A grant of partial summary judgment would prevent these issues from being properly developed. Given the unique scenario posited by this case, it is respectfully submitted that the Motion for Partial Summary Judgment should be denied.

Dated this 10th day of December, 2019.

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PENNSYLVANIA AMERICAN WATER COMPANY

AFFIDAVIT OF SERVICE

The undersigned hereby certifies that he did, on December 10, 2019, serve a true copy of the document to which this certificate is attached by United States mail, first class, postage prepaid, and by electronic mail addressed as follows:

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